the need for assistance arises, but the employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision.

(3) Typically, public recreation and park facilities, and stadiums or auditoriums utilize employees in occasional or sporadic work. Some of these employment activities are the taking of tickets, providing security for special events (*e.g.*, concerts, sports events, and lectures), officiating at youth or other recreation and sports events, or engaging in food or beverage sales at special events, such as a county fair. Employment in such activity may be considered occasional or sporadic for regular employees of State or local government agencies even where the need can be anticipated because it recurs seasonally (*e.g.*, a holiday conert at a city college, a program of scheduled sports events, or assistance by a city payroll clerk in processing returns at tax filing time). An activity does not fail to be occasional merely because it is recurring. In contrast, for example, if a parks department clerk, in addition to his or her regular job, also regularly works additional hours on a part-time basis (*e.g.*, every week or every other week) at a public park food and beverage sales center operated by that agency, the additional work does not constitute intermittent and irregular employment and, therefore, the hours worked would be combined in computing any overtime compensation due.

(c) *Different capacity*. (1) In order for employment in these occasional or sporadic activities not to be considered subject to the overtime requirements of section 7 of the FLSA, the regular government employment of the individual performing them must also be in a different capacity, *i.e.*, it must not fall within the same general occupational category.

(2) In general, the Administrator will consider the duties and other factors contained in the definitions of the 3-digit categories of occupations in the *Dictionary of Occupational Titles* (except in the case of public safety employees as discussed below in section (3)), as well as all the facts and circumstances in a particular case, in determining whether employment in a second capacity is substantially different from the regular employment.

(3) For example, if a public park employee primarily engaged in playground maintenance also from time to time cleans an evening recreation center operated by the same agency, the additional work would be considered hours worked for the same employer and subject to the Act's overtime requirements because it is not in a *different capacity*. This would be the case even though the work was *occasional or sporadic*, and, was not regularly scheduled. Public safety employees taking on any kind of security or safety function within the same local government are never considered to be employed in a *different capacity*.

(4) However, if a bookkeeper for a municipal park agency or a city mail clerk occasionally referees for an adult evening basketball league sponsored by the city, the hours worked as a referee would be considered to be in a different general occupational category than the primary employment and would not be counted as hours worked for overtime purposes on the regular job. A person regularly employed as a bus driver may assist in crowd control, for example, at an event such as a winter festival, and in doing so, would be deemed to be serving in a different capacity.

(5) In addition, any activity traditionally associated with teaching (e.g., coaching, career counseling, etc.) will not be considered as employment in a *different capacity*. However, where personnel other than teachers engage in such teaching-related activities, the work will be viewed as employment in a *different capacity*, provided that these activities are performed on an occasional or sporadic basis and all other requirements for this provision are met. For example, a school secretary could substitute as a coach for a basketball team or a maintenance engineer could provide instruction on auto repair on an occasional or sporadic basis.

§ 553.31 Substitution—section 7(p)(3).

(a) Section 7(p)(3) of the FLSA provides that two individuals employed in any occupation by the same public

agency may agree, solely at their option and with the approval of the public agency, to substitute for one another during scheduled work hours in performance of work in the same capacity. The hours worked shall be excluded by the employer in the calculation of the hours for which the substituting employee would otherwise be entitled to overtime compensation under the Act. Where one employee substitutes for another, each employee will be credited as if he or she had worked his or her normal work schedule for that shift.

(b) The provisions of section 7(p)(3) apply only if employees' decisions to substitute for one another are made freely and without coercion, direct or implied. An employer may suggest that an employee substitute or ''trade time'' with another employee working in the same capacity during regularly scheduled hours, but each employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision. An employee's decision to substitute will be considered to have been made at his/her sole option when it has been made (i) without fear of reprisal or promise of reward by the employer, and (ii) exclusively for the employee's own convenience.

(c) A public agency which employs individuals who substitute or ''trade time'' under this subsection is not required to keep a record of the hours of the substitute work.

(d) In order to qualify under section 7(p)(3), an agreement between individuals employed by a public agency to substitute for one another at their own option must be approved by the agency. This requires that the agency be aware of the arrangement prior to the work being done, i.e., the employer must know what work is being done, by whom it is being done, and where and when it is being done. Approval is manifest when the employer is aware of the substitution and indicates approval in whatever manner is customary.

§ 553.32 Other FLSA exemptions.

(a) There are other exemptions from the minimum wage and/or overtime requirements of the FLSA which may apply to certain employees of public agencies. The following sections provide a discussion of some of the major exemptions which may be applicable. This list is not comprehensive.

(b) Section 7(k) of the Act provides a partial overtime pay exemption for public agency employees employed in fire protection or law enforcement activities (including security personnel in correctional institutions). In addition, section 13(b)(20) provides a complete overtime pay exemption for any employee of a public agency engaged in fire protection or law enforcement activities, if the public agency employs less than five employees in such activities. (See subpart C of this part.)

(c) Section 13(a)(1) of the Act provides an exemption from both the minimum wage and overtime pay requirements for any employee employed in a bona fide executive, administrative, professional, or outside sales capacity, as these terms are defined and delimited in part 541 of this title. An employee will qualify for exemption if he or she meets all of the pertinent tests relating to duties, responsibilities, and salary.

(d) Section 7(j) of the Act provides that a hospital or residential care establishment may, pursuant to a prior agreement or understanding with an employee or employees, adopt a fixed work period of 14 consecutive days for the purpose of computing overtime pay in lieu of the regular 7-day workweek. Workers employed under section 7(j) must receive not less than one and one-half times their regular rates of pay for all hours worked over 8 in any workday, and over 80 in the 14-day work period. (See § 778.601 of this title.)

(e) Section 13(a)(3) of the Act provides a minimum wage and overtime pay exemption for any employee employed by an amusement or recreational establishment if (1) it does not operate for more than 7 months in any calendar year or (2) during the preceding calendar year, its average receipts for any 6 months of such year were not more than 33⅓ percent of its average receipts for the other 6 months of such year. In order to meet the requirements of section 13(a)(3)(B), the establishment in the previous year must have received at least 75 percent